No. A-____

IN THE SUPREME COURT OF THE UNITED STATES

EDDIE JACKSON, *et al.*,

Applicants-Appellants,

v.

RICK PERRY, *et al.*,

Respondents-Appellees.

On Appeal from the United States District Court for the Eastern District of Texas

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APPLICATION FOR A STAY OR INJUNCTION PENDING APPEAL

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To the Honorable Antonin Scalia, Associate Justice of the United States and Circuit Justice for the Fifth Circuit:

Applicants[1] seek a stay of a divided ruling of a three-judge district court rejecting – after an expedited merits trial – all constitutional and statutory challenges to Plan 1374C, the notorious congressional redistricting map passed by the Texas Legislature in October 2003.[2] The effect of the relief we seek would be to reinstate for use in 2004 the prior plan drawn by a federal court in 2001 after a legislative deadlock.[3]

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[1] Applicants include the "Jackson Plaintiffs" and the "Democratic Congressional Intervenors," all of whom were listed on the Notice of Appeal filed in the District Court on January 7, 2004 and attached as Exhibit A to this Application. All parties stipulated that this list of plaintiffs includes persons with standing to raise all claims discussed here. Applicants also include the Texas Coalition of Black Democrats and the "Cherokee County Plaintiffs."

[2] The majority and dissenting opinions below are attached as Exhibit B to this Application and are cited here as "Majority Op." and "Dissent," respectively.

[3] Should the Court deem a request for a "stay" inapt in the unusual procedural posture of this case, *see infra* note 37, Applicants alternatively seek an injunction pending appeal requiring use of the prior court-ordered map in the 2004 elections.

As we show, there is a high likelihood that this Court will note probable jurisdiction and reverse one or more of the legal rulings that were central to the decision below upholding the map. Among those rulings were the following: *First*, the District Court upheld the constitutionality of the State's decision to redraw a perfectly lawful congressional district plan in the middle of the decade for the sole purpose of partisan maximization, even though it did not quarrel with the State's own expert witness, who testified that the new plan is an extreme and very effective partisan gerrymander. *Second*, the majority misread this Court's treatment of the Voting Rights Act in such cases as *Georgia v. Ashcroft*, 123 S. Ct. 2498 (2003), and *Johnson v. De Grandy*, 512 U.S. 997 (1994), in ruling that the only districts that "count" under the Act are those in which one minority group constitutes a literal mathematical majority of the population. On that basis, the court blessed the deliberate destruction of minority voting opportunities around the State, including the elimination of the Dallas-Fort Worth area's District 24, where it was undisputed that African-Americans had previously been able to elect their preferred candidates, and South Texas's District 23, where Hispanics had constituted 55% of the registered voters. *Third*, the court mangled the law of intentional discrimination so that it no longer provides any meaningful check on actions deliberately diluting minority voting strength. *Fourth* and finally, the court below upheld as constitutional under *Shaw v. Reno*, 509 U.S. 630 (1993), an absurdly noncompact district that uses a long, thin corridor of largely empty counties to connect two far-flung pockets of dense Hispanic population that are 300 miles apart. It did so in large part because that new district was created in response to efforts to protect a Republican incumbent in a nearby district – the precise kind of political justification for racial gerrymandering that this Court rejected in *Bush v. Vera*, 517 U.S. 952 (1996).

The likelihood that the Court will see a need to review and correct these specific rulings is more than sufficient to justify a stay pending appeal – especially given that there exists an alternative districting plan, drawn by a federal court in 2001 and used in the 2002 elections, that (1) has been adjudicated to be fully lawful, (2) was conceded by the State's expert to be politically fair, (3) could be used immediately with no substantial disruption to the election processes this year, and (4) has already been used by candidates seeking to qualify for placement on the 2004 ballot, including all 32 incumbents.

The balance of equities here strongly favors a stay. On the one hand, if the Court notes probable jurisdiction and reverses the judgment below, the rights of Texas voters will have been illegally abridged, and their Representatives will have been thrown out of office based solely on party, not performance. On the other hand, if this Court allows the 2004 elections to proceed under the same lawful map used in 2002, *no individual's rights will be denied*, and the only "harm," if the Court ultimately affirms, will be a two-year delay in implementing the Legislature's "single-minded [scheme] to gain partisan advantage." Majority Op. at 24. Thus, the concrete harms that a stay would avert far outweigh any supposed injury that Defendants might concoct.

Moreover, a simple listing of some of the major legal errors committed below understates the true national importance of this case. The 2003 Texas congressional redistricting is proof that the redistricting process in this country has gone completely haywire. Texas's state government was mired for months in partisan fights over passage of a map that was drawn for only one purpose – to replace a fair map with a severely biased one. Although it soon became clear that full achievement of that partisan goal would require depriving minority voters of an equal opportunity to participate in the political process and elect preferred candidates, the

Defendants not only plowed ahead but sought to transform their avowed partisanship into a *justification* for diluting minority rights as well as for the egregious *Shaw* violation in South Texas.

The majority below endorsed this strategy at every turn. It denied liability for line-drawing designed to lock in partisan control. It then pointed to the map-drawers' partisanship as a reason for denying liability for their intentional elimination of minority districts. It went on to severely limit the protections of Section 2 of the Voting Rights Act. And finally, the partisan gerrymander became an answer to a *Shaw* violation, as well.

This combination of rulings, if upheld, will unleash an orgy of partisan gerrymandering without limits. Even the rights of racial and ethnic minorities will be at risk if they get in the way of partisan goals. The resulting maps will resemble the Texas map, which takes racial *and* political balkanization to a new level.

As we show, a partial answer to these problems would be to put some meaningful limit on partisan gerrymandering – perhaps, as the District Court suggested, a bar to unnecessary mid-decade line changes. *See* Majority Op. at 31-32. But regardless of how the Court addresses that issue, it must correct the erroneous rulings below rejecting claims of racial vote dilution and racial gerrymandering. Those rulings not only leave minority voters unprotected from the kind of deliberate mistreatment shown in this record but will actually encourage line-drawers to continue to segregate our society along racial lines unnecessarily in the service of a nakedly partisan agenda.

STATEMENT OF FACTS

After the 2000 federal decennial census, Texas became entitled to 32 seats in Congress. The task of replacing the 30 old malapportioned districts from the 1990s with 32 new

equipopulous ones fell initially to the Texas Legislature. The Texas Constitution provides that the Legislature "shall, at its first regular session after the publication of each United States decennial census, apportion the state into senatorial and representative districts."[4] Although the Texas Constitution does not expressly address congressional districts, the Legislature's consistent practice has been to handle congressional redistricting in a similar manner.

In 2001, the Governor and the leaders of the Texas Senate were Republicans and the leaders of the Texas House of Representatives were Democrats. The Legislature failed to reach agreement on a new congressional map in its 2001 regular session, and Governor Rick Perry opted not to call a special session. The Legislature's default ultimately left a three-judge federal district court in *Balderas v. Texas* "with the 'unwelcome obligation of performing in its stead.'"[5] On November 14, 2001, the *Balderas* court, based on findings that the 30 existing congressional districts in Texas were unconstitutional, and based upon the continuing "failure of the State to produce a congressional redistricting plan," unanimously imposed on the State of Texas a new 32-district congressional map known as "Plan 1151C."[6] The District Court rendered a final judgment "adopting Plan 1151C as the remedial congressional redistricting plan for the State of Texas."[7]

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[4] Tex. Const. art. III, § 28.

[5] *Balderas v. Texas*, Civil No. 6:01-CV-158, slip op. at 1 (E.D. Tex. Nov. 14, 2001) (three-judge court) (*per curiam*) (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977)), *summarily aff'd*, 536 U.S. 919 (2002). The *Balderas* court's *per curiam* opinion is attached as Exhibit C.

[6] *Id.* Detailed maps and statistical data on Plan 1151C can be found on the Texas Legislative Council's website, at http://www.tlc.state.tx.us/research/redist/redist.htm. A color map of Plan 1151C is attached as Exhibit D.

[7] Final Judgment, *Balderas v. Texas*, Civil No. 6:01-CV-158, at 1 (E.D. Tex. Nov. 14, 2001) (three-judge court), *summarily aff'd*, 536 U.S. 919 (2002). The *Balderas* court's final judgment is attached as Exhibit E.

The *Balderas* court stated that it had followed the process for drawing districts recommended by Rice University political-science professor John R. Alford, who served as the State's expert witness in the 2001 litigation. Professor Alford's suggested process was grounded in "principles of district line-drawing that stand politically neutral."[8] Moreover, the court "checked [its] plan against the test of general partisan outcome, comparing the number of districts leaning in favor of each party based on prior election results against the percentage breakdown statewide of votes cast for each party in congressional races."[9] The court found that its plan was "likely to produce a congressional delegation roughly proportional to the party voting breakdown across the state."[10] Recognizing Texas's "traditional state interest in the power of its congressional delegation" and the relationship between seniority and congressional leadership, the *Balderas* court confirmed that the plan did not pair any incumbent Representative with another incumbent and did not harm the re-election prospects of three Democrats and three Republicans holding "unique, major leadership posts" in Congress.[11]

Neither the State of Texas nor any other Defendant appealed the court's decision. The only appeal was taken by a group of Hispanic voters known as the "Balderas Plaintiffs." The State of Texas filed a motion asking this Court to affirm the district court's judgment. This Court summarily affirmed on June 17, 2002.[12] The court-drawn Plan 1151C governed the 2002 congressional elections in Texas.

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8 *Balderas*, slip op. at 5, *attached as* Exhibit C.

9 *Id.* at 9.

10 *Id.*

11 *Id.* at 8.

12 *Balderas v. Texas*, 536 U.S. 919 (2002).

Although Plan 1151C created several potentially very competitive districts, based on recent statewide elections (for President, U.S. Senator, Governor, Lieutenant Governor, and so on) it appeared that 20 districts leaned at least somewhat Republican and 12 districts (11 of which were "majority-minority" districts) leaned at least somewhat Democratic.[13] But the November 2002 general elections generated a congressional delegation with 15 Republicans and 17 Democrats. The two new congressional districts that Texas gained from reapportionment elected Republicans, while the other 30 districts re-elected 28 incumbents and elected one freshman from each party (each of whom replaced a retiring member of the same party). Seven of the incumbents – six Democrats and one Republican – prevailed even as their districts were voting for senatorial, gubernatorial, and other statewide candidates of the *opposite* party. In other words, seven current Members of Congress won because they attracted split-ticket voters. Without that support, each would have lost to a challenger from the district's dominant political party. These seven Congressmen (most of whom represent relatively rural districts) had the closest contests of any incumbents in the State. Three of them won with less than 52% of the total vote. Aside from the seven districts where split-ticket voters played a key role, 14 of the new districts voted consistently Republican and 11 voted consistently Democratic. But because six of the seven incumbents who won the relatively competitive seats were Democrats, Texas's congressional delegation has more Democrats and fewer Republicans than the current statewide balance of power alone would have suggested.

At the same time that Republicans were picking up two new congressional seats, they also were making gains at the state-legislative level. As a result, Republicans won a majority of

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[13] Jackson Pls. Ex. 44 (Alford expert report) at 25, *attached as* Exhibit F; Jackson Pls. Ex. 75.

seats in the Texas House of Representatives and, with it, unified control of the state government for the first time in decades.

In 2003, the newly elected 78th Legislature convened and the House Redistricting Committee began considering congressional redistricting in its regular session. As a critical deadline approached for passing legislation in the House, a group of Democratic House Members left the State and broke quorum for a week, effectively killing the congressional redistricting measure for the regular session.[14]

Governor Perry called the Texas Legislature into special session to take up congressional redistricting. During that session, the Texas House, which had refused to hold public field hearings on redistricting during the regular session, reversed itself and decided to hold hearings across the State.[15] The Texas Senate also scheduled a series of field hearings. At these public hearings, thousands of Texas voters appeared and gave their views on the propriety of mid-decade congressional redistricting. The vast majority opposed it.[16]

During the first special session, Representative Phil King, the legislation's lead sponsor, initially asked the Redistricting Committee to pass a map that would have dismantled District 24 (in the Dallas-Fort Worth area) as a minority district.[17] The next day, he reversed course and supported a plan that left intact all 11 majority-minority districts.[18] He stated at the time that he

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14 Tr., Dec. 15, 2003, 1:00 p.m., at 76-77 (Rep. Richard Raymond).

15 *Id.* at 73-75, 78-79 (Rep. Richard Raymond).

16 Tr., Dec. 17, 2003, 1:00 p.m., at 115 (Sen. Royce West).

17 Tr., Dec. 18, 2003, 1:00 p.m., at 149 (Rep. Phil King).

18 *Id.* at 149-51 (Rep. Phil King).

was doing so to improve the chances of winning preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.[19]

The Senate Jurisprudence Committee also took up congressional redistricting in the first special session. But the Senate failed to pass a map in that session when 11 state senators (more than a third of the 31-member chamber) announced that they were opposed to taking up congressional redistricting legislation. It has been a long-standing tradition of the Texas Senate to require that a measure receive support of a two-thirds supermajority before the full Senate will consider it.[20]

When Lieutenant Governor David Dewhurst then announced that he would abandon the two-thirds rule in any future special session on congressional redistricting, 11 Texas senators left the State to deprive the Senate of a quorum.[21] But when one of them returned to the State a month later, Governor Perry called a third special session. Each house passed a map that preserved all 11 minority districts.[22] But the conference committee instead produced a map that dismantled as minority districts both District 24 in the Dallas-Fort Worth area and District 23 in South Texas, while adding a new Hispanic-controlled district running from McAllen (on the Mexican border) 300 miles north to Austin.[23] The House and Senate passed this new map,

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19 *Id.* at 148-50 (Rep. Phil King).

20 Tr., Dec. 15, 2003, 8:30 a.m., at 7-8 (Sen. Bill Ratliff).

21 Tr., Dec. 17, 2003, 1:00 p.m., at 119 (Sen. Royce West).

22 Tr., Dec. 15, 2003, 1:00 p.m., at 83 (Rep. Richard Raymond).

23 Tr., Dec. 18, 2003, 1:00 p.m., at 148-49, 157 (Rep. Phil King).

known as "Plan 1374C," on October 10 and 12, 2003.[24] Every Hispanic and African-American Senator and all but two of the minority Representatives voted against Plan 1374C.[25]

The new map shifted more than eight million Texans into new districts and split more counties into more pieces than did Plan 1151C.[26] And the 32 districts in the new map were, on average, substantially less compact than their predecessors, under either of the two quantitative measures of compactness that the Legislature uses.[27]

Plan 1374C was designed to protect all 15 Republican Members of Congress and to defeat at least 7 of the 17 Democratic Members.[28] Among those targeted for defeat were the six Democrats who had won in November 2002 on the strength of ticket-splitting voters. Each of them was "paired" with another incumbent, placed in a substantially more Republican district, or given hundreds of thousands of new, unfamiliar (and heavily Republican) constituents who would be less likely to split their tickets based on personal allegiance.

The seventh Democrat targeted for defeat was Congressman Martin Frost, an Anglo Democrat who represents District 24 in the Dallas-Fort Worth area. District 24 is a majority-minority district whose total population is roughly 23% black, 38% Hispanic, 35% Anglo (*i.e.*, non-Hispanic white), and 4% Asian or "Other."[29] In general elections, the district is reliably Democratic. And in the Democratic primary elections, where the ultimate winners are

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[24] Detailed maps and statistical data on Plan 1374C can be found on the Texas Legislative Council's website, at http://www.tlc.state.tx.us/research/redist/redist.htm. A color map of Plan 1374C is attached as Exhibit G.

[25] Tr., Dec. 15, 2003, 1:00 p.m., at 85 (Rep. Richard Raymond).

[26] Jackson Pls. Ex. 141 (Gaddie expert report) at 5-6, *attached as* Exhibit H; Jackson Pls. Ex. 89.

[27] Jackson Pls. Ex. 141 (Gaddie expert report) at 6-7, *attached as* Exhibit H.

[28] Jackson Pls. Ex. 44 (Alford expert report) at 30, *attached as* Exhibit F.

[29] Attached as Exhibits I and J are two color maps depicting District 24 in Dallas and Fort Worth (Tarrant County) under Plan 1151C.

nominated, blacks typically constitute more than 60% of the electorate, because the Anglo and Hispanic voters in the district are much more likely to participate in the Republican primary or simply to stay home.[30] Thus, African-American voters can consistently nominate and elect their preferred candidates within District 24.[31] But under the new Plan 1374C, the minority population from District 24 was splintered into five pieces, each of which was then submerged in an overwhelmingly Anglo Republican district.[32]

The one Republican incumbent who had won narrowly in November 2002 by attracting ticket splitters – Congressman Henry Bonilla of District 23 – was made substantially safer, as nearly 100,000 Hispanics from the Laredo area – who are roughly 87% Democratic – were removed and replaced with a similar number of Anglos from the "Hill Country" region – who are roughly 79% Republican.[33] But 359,000 Hispanics remain stranded in Congressman Bonilla's district, now with no hope of electing their preferred candidate.[34]

In an attempt to "offset" that obvious loss of electoral opportunity for Hispanics, the Legislature drew a new, bizarrely shaped majority-Hispanic district stretching from the Rio Grande Valley, along the border with Mexico, all the way to the Hispanic neighborhoods of Austin in Central Texas. This district, new District 25, is more than 300 miles long and in places less than 10 miles wide. *See attached* Exhibit N (color map showing a silhouette of District 25). The two ends of the district are densely populated and contain more than 89% of the district's

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30 Tr., Dec. 11, 2003, 1:00 p.m., at 73-75 (Prof. Allan J. Lichtman); Jackson Pls. Ex. 140 (Gaddie expert deposition) at 32-33.

31 Jackson Pls. Ex. 1 (Lichtman expert report) at 23-26, *attached as* Exhibit K.

32 Attached as Exhibits L and M are two color maps depicting Dallas and Fort Worth (Tarrant County) under Plan 1374C.

33 Jackson Pls. Ex. 44 (Alford expert report) at 15, *attached as* Exhibit F.

34 Jackson Pls. Ex. 1 (Lichtman expert report) at 52-53, *attached as* Exhibit K.

Hispanic population, as the six intervening rural counties serve primarily to "bridge" the two population centers. *See attached* Exhibit O (color map showing population densities in and around District 25).

Faced with this plan, several dozen individual voters and officeholders, as well as the NAACP, the League of United Latin American Citizens (LULAC), and other minority and civil-rights organizations filed suit in the Eastern District of Texas, asking the federal court to invalidate Plan 1374C and to maintain the November 2001 *Balderas* injunction that had put Plan 1151C into effect. The court consolidated the cases (including the 2001 *Balderas* lawsuit) and set an expedited discovery schedule, culminating in a trial in mid-December 2003. The court also ordered the Texas Secretary of State to issue an official directive to all county election administrators to stand ready to use either Plan 1374C or Plan 1151C in the March 9, 2004 primary elections.[35] Pursuant to the court's order, candidates who wished to file for Congress under Plan 1151C's districts could do so during the normal filing period, which closed on January 2, 2004. All 32 incumbents did so.[36] Candidates who wish to file for Congress under Plan 1374C will be allowed to do so during a supplemental, court-ordered filing period that will close at 5:00 p.m. Central Time on Friday, January 16, 2004. Thus, under the court-imposed schedule, no significant steps in the electoral process leading to the March 2004 primaries can take place until January 19 at the earliest.

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[35] Order Ensuring Orderly Preparations for March 2004 General Primary Elections in *Session v. Perry*, Civil Action No. 2:03-CV-354 consolidated (E.D. Tex. Nov. 12, 2003) (three-judge court), *attached as* Exhibit P.

[36] Last week, District 4's Democratic Congressman Ralph Hall filed for re-election under Plan 1151C as a Republican; so Texas's House delegation is now evenly divided, with 16 Democrats and 16 Republicans.

The court held the expedited trial in mid-December, and the Department of Justice precleared Plan 1374C under Section 5 of the Voting Rights Act after the parties had rested but before closing arguments. On January 6, 2004, the District Court issued an opinion by Circuit Judge Patrick E. Higginbotham and District Judge Lee H. Rosenthal upholding Plan 1374C and effectively dissolving the November 2001 injunction that had imposed Plan 1151C. In his partial dissent, District Judge T. John Ward explained that he would have held Plan 1374C in violation of Section 2 of the Voting Rights Act and "order[ed] the elections to be held under Plan 1151C, a plan that is beyond dispute a legal one." Dissent at 23.

Applicants moved for a stay pending appeal, which the District Court denied on Wednesday, January 7, 2004. Exhibit Q.

ARGUMENT

A Circuit Justice may grant a stay of a district court order if an Applicant shows: (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to note probable jurisdiction; (2) a fair prospect that five Justices will conclude that the case was erroneously decided below; (3) that irreparable harm will likely result from a denial of a stay; and (4) that, in a close case, the injury asserted by the Applicant outweighs the relative harms to other parties and the public at large. *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers); *see Edwards v. Hope Medical Group for Women*, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers) (applying comparable considerations).[37] That test is easily met here.

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[37] Defendants may argue that Applicants are really seeking an injunction barring use of the newly enacted map, rather than a stay. But since the decision below had the effect of lifting the 2001 injunction requiring use of the court-drawn Plan 1151C, it is more appropriate to think of the relief sought here as staying that modification. In any event, this is a distinction with no practical significance here, for two reasons. *First*, the same standards have been applied in considering requests for injunctions pending appeal in the elections context. *See, e.g., Lucas v.*

(Cont'd . . .)

I. Applicants Have a High Likelihood of Success.

A. The District Court Erred in Rejecting Challenges to Plan 1374C as a Partisan Gerrymander, Particularly Given that It Was Enacted Mid-Decade.

As this Court well knows from its consideration of the Pennsylvania gerrymandering case, *Vieth v. Jubelirer*, No. 02-1580 (argued Dec. 10, 2003), partisan-gerrymandering claims were held to be justiciable in *Davis v. Bandemer*, 478 U.S. 109 (1986). If that remains good law, then Texas's Plan 1374C is surely unconstitutional.

As the District Court expressly found, the Republican Party leadership in 2003 was not content with a court-drawn map in which "20 of the 32 seats offer[ed] a Republican advantage," because 6 of those 20 seats were sufficiently competitive to allow popular Democratic incumbents to squeak through the November 2002 elections with the support of split-ticket voters. Majority Op. at 25. So as soon as they won control of the Texas Legislature, the Republican leadership took the unprecedented step of redrawing a perfectly lawful congressional districting plan in the middle of a decade "'solely for the purpose of seizing between five and seven seats from Democratic incumbents.'" *Id.* at 28 (citation omitted). They thus "set out to increase their representation in the congressional delegation to 22." *Id*. at 25. That objective, the court below explained, "was 110% of the motivation for the Plan." *Id*. at 28. Indeed, the court was "compelled to conclude that this plan was a political product from start to finish." *Id.*

(. . . cont'd)
Townsend, 486 U.S. at 1304 (enjoining referendum pending appeal of denial of Voting Rights Act challenge); *see also Clark v. Roemer*, 498 U.S. 953 (1990) (granting application for stay of district court order pending appeal and for injunction to prevent election from being held). *Second*, as noted above, there is an alternative map that has been adjudicated lawful, was used in the 2002 elections, and could be used again with minimal disruption of election processes. Indeed, prior to the District Court's ruling, a full slate of candidates (including all 32 incumbents) had already filed to run for Congress under that map. In this kind of situation, where Applicants are seeking to maintain, not change, the status quo, the usual concerns raised by requests for affirmative injunctive relief do not apply.

Moreover, the 22 seats were designed not merely to *tilt* Republican, but rather to lock in a safe 22-to-10 advantage that, in the words of one Republican staffer, "should assure that Republicans keep the House [of Representatives] no matter the national mood."[38] As Judge Ward put it in his dissent, the State of Texas sought to "'dictate electoral outcomes'" in these 22 districts. Dissent at 1 (citation omitted). The State's own expert, Professor Ronald Keith Gaddie, testified that the State would achieve its objective, concluding that Plan 1374C "was designed by the Republican state legislature to advantage Republicans in congressional elections in the state of Texas. The map creates ten Democratic districts and twenty-two Republican districts; disrupts numerous Democratic incumbents from their constituencies; and pairs many Democratic incumbents in Republican districts with Republican incumbents."[39] The State's former expert, Professor Alford, concurred, testifying (now on behalf of Applicants) that Republicans would likely retain all 22 seats even if Democrats made substantial gains throughout the State and once again became the majority party in the Texas electorate.[40] Thus, the map was designed to assure that one political party would control at least 69% of the seats (22 out of 32) even with 49% or less of the votes – a remarkable partisan skew that was never seriously contested in the court below and that exceeds even that of the Pennsylvania plan at issue in *Vieth v. Jubelirer*.[41]

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38 Jackson Pls. Ex. 129 (Joby Fortson e-mail message), *attached as* Exhibit R.

39 Jackson Pls. Ex. 141 (Gaddie expert report) at 24, *attached as* Exhibit H; *see also* Tr., Dec. 18, 2003, 1:00 p.m., at 142 (State Rep. Phil King) (confirming that the Republican leadership set out to "get as many seats as we could").

40 Jackson Pls. Ex. 44 (Alford expert report) at 24-25, *attached as* Exhibit F.

41 By contrast, both sides' experts testified that the court-drawn Plan 1151C contained only a slight pro-Republican bias. Jackson Pls. Ex. 141 (Gaddie expert report) at 18-19, *attached as* Exhibit H; Jackson Pls. Ex. 44 (Alford expert report) at 27, *attached as* Exhibit F.

But unlike *Vieth*, this case need not turn on judicial parsing of election returns or statistical expert reports. While partisan-gerrymandering cases generally present thorny questions about "how much partisanship is too much" and thus raise delicate issues of judicial manageability, this case is much simpler, because the bias in the map was openly conceded and because the case presents a question not raised in *Bandemer* or *Vieth*: Whether a State can replace a perfectly lawful congressional districting plan in the middle of a decade, for no reason other than partisan maximization.

Redrawing a map in the middle of a decade solely for partisan gain is the ultimate affront to traditional neutral districting principles. Indeed, in real-world redistricting, no principle is more firmly ensconced than the notion that districts may be redrawn *only* when population shifts, evidenced by the federal decennial census, *require* them to be redrawn. If congressional districts can be redrawn every two years, when there is no population-based justification for doing so, endangered incumbents from the favored party can be shielded from the winds of changing public opinion, while popular incumbents from the rival party can be targeted for defeat.

That turns on its head the Framers' design, in which the House of Representatives was to be the most responsive and democratic organ of our national government.[42] In designing the House to foster democratic accountability, the Framers had to accommodate, on the one hand, the need for equal representation for equal numbers of people, and on the other hand, the need for stability in relations between the Representatives and the represented.[43] Stable relations between Representatives and their constituents allow voters to reward effective Representatives

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[42] For background on the relationship between the Framers' design and partisan gerrymandering, see the *amicus* brief of the Pulitzer Prize-winning constitutional historian Jack N. Rakove filed in *Vieth v. Jubelirer* on August 29, 2003.

[43] *See, e.g.*, The Federalist No. 53, at 332 (James Madison) (Clinton Rossiter ed., 1961); *id.* No. 36, at 220 (Alexander Hamilton).

with re-election, while weeding out those who have fallen out of step or proved to be ineffective.[44] But – as this Court concluded in *Wesberry v. Sanders*, 376 U.S. 1 (1964) – over time, a completely stable set of constituencies would become wildly unequal in population and thus would undermine the Framers' other goal – equal representation. The Framers considered leaving to Congress the job of reconciling these partially conflicting goals of stability and equality, but ultimately rejected that approach because its Members would have too much of a vested interest in the status quo and equality therefore would suffer.[45]

Instead, the Framers set up a rigid, fixed calendar of biennial House elections and decennial reapportionment of Representatives among the States. U.S. Const. art. I, § 2, cl. 1 & 3. Thus, four out of every five elections would promote stability; and every fifth election (after the decennial census) would promote equality by readjusting constituencies to reflect population shifts that had occurred in the previous ten years. It can hardly be disputed that the plain text of Article I establishes this rhythm – one post-reapportionment election cycle, followed by four regular election cycles. Nor can it be disputed that a round of mid-decade reapportionment of congressional seats *among* the several States would flatly violate Article I of the Constitution.

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[44] *See White v. Weiser*, 412 U.S. 783, 791, 797 (1973) (applauding the State of Texas's good-faith efforts, when redistricting is mandated by new census results, to "maintain[] existing relationships between incumbent congressmen and their constituents"), *cited favorably in Bush v. Vera*, 517 U.S. at 964-66 (O'Connor, J., principal opinion) (holding that maintenance of the unique relationship between a Member of Congress and his constituents is a "legitimate state goal" and a "traditional districting principle"). As Justice Story explained, "a fundamental axiom of republican governments [provides] that there must be a dependence on, and responsibility to, the people, on the part of the representative, which shall constantly exert an influence upon his acts and opinions, and produce a sympathy between him and his constituents." 2 Joseph Story, Commentaries on the Constitution of the United States § 586 (1833).

[45] *See, e.g.*, 1 The Records of the Federal Convention of 1787, at 578-79 (Max Farrand ed., rev. ed. 1966).

But the court below effectively held that congressional redistricting *within* a given State can occur any time in the decade, for any reason, including raw partisan greed. If Article I places temporal constraints on congressional reapportionment but not on congressional redistricting, then what happened in Texas in 2003 will soon become the norm. Indeed, Democrats in Illinois and Oklahoma are already plotting to emulate the Texas Republicans' strategy.[46] *Biennial* redistricting will allow any political party that wins momentary control of the legislature and governorship to entrench its power through an initial gerrymander, and then to "fine tune" the gerrymander every two years. Partisan cartographers will stay one step ahead of the voters and thus insulate their congressional allies from all but the strongest electoral tides. *See* Majority Op. at 2 ("But, perversely, these seizures [of power through gerrymandering] entail political moves that too often dance close to avoiding the recall of the disagreeing voter."). Such a distorted and fundamentally antidemocratic process cannot possibly be squared with the Framers' vision of a House of Representatives controlled by "the People of the several States." U.S. Const. art. I, § 2, cl. 1.

This Court has repeatedly derived from Article I implicit limitations on how state legislatures may act with respect to the congressional election process: the exacting standards of population equality that apply only to congressional districting plans, *see Wesberry v. Sanders*, 376 U.S. 1 (1964), and *Karcher v. Daggett*, 462 U.S. 725 (1983); the rule that States may not establish term limits for Members of Congress, *see U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); and the rule that States may not seek to dictate electoral outcomes by adding notations about congressional candidates' issues positions to the ballot, *see Cook v. Gralike*, 531

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[46] *See* Lynn Sweet, *Jones Puts Remap on Drawing Board*, Chicago Sun-Times, Nov. 20, 2003, at 43; Ray Carter, *Mass Files Bill to Redraw Congressional Lines*, [Oklahoma City] Journal-Record, Dec. 23, 2003.

U.S. 510 (2001). Mid-decade partisan gerrymandering, by needlessly and manipulatively denying voters the opportunity to vote in the same district until the next census and apportionment, deprives citizens of their right to hold Representatives to account and thus exacerbates the existing tendency of state legislators to determine for themselves, through gerrymandering, the Representatives the State will send to Congress. The Court should respond to this new form of abuse of the right of "the People of the several States" to freely choose their preferred Representatives, just as it has responded to previous legislative abuses of the same right.

B. The Intentional Dismantling of District 24, Leaving African-American Texans with a Disproportionately Small Share of Districts in Which They Can Elect Their Chosen Representatives, Violates Both the Voting Rights Act and the Equal Protection Clause.

This appeal presents two interrelated questions involving District 24 in the Dallas-Fort Worth area. District 24, running from the African-American community of southeast Fort Worth to the African-American and Hispanic neighborhoods of Dallas County, is one of only two districts in the 2001 court-drawn map in the Dallas/Fort Worth Metroplex where minorities have a meaningful opportunity to elect candidates of their choice. Although African-Americans do not constitute close to a majority of the population on their own, the district functions, for all practical purposes, as an "effective" African-American-controlled district.[47] Because Hispanics vote in low numbers and most Anglos are Republicans, African-Americans constitute about 64% of the Democratic primary electorate, so their preferred nominee is almost always selected. Dissent at 25. In the general election, they constitute about 33% of the voters. Majority Op. at

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[47] *See generally* Bernard Grofman, Lisa Handley & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. Rev. 1383 (2001) (explaining how African-Americans can control a district politically without dominating numerically), *cited in Georgia v. Ashcroft*, 123 S. Ct. at 2513.

47. An additional 6% are Hispanics who, like the African-Americans, vote almost unanimously for the Democratic nominee in this district, according to Defendants' own expert analyses. Thus, for the African-American candidate of choice to be elected, there need only be "crossover" support from about a fifth of the Anglo voters. In practice, although a large majority of Anglos vote against Democratic nominees in general elections, the crossover rate is high enough that the African-American candidate of choice wins consistently.[48] Indeed, in the 20 general elections for statewide office during the last five years, the candidate preferred by black and Hispanic voters carried this district 19 times.

Plan 1374C eliminates this district. Its population was divided among five districts, all of which are dominated by Anglo Republican voters. A particularly egregious feature of the plan is District 26, which is based in suburban (and heavily Anglo) Denton County but shoots a long finger down into Tarrant County to scoop up the politically active African-American community in southeast Fort Worth. There could hardly be a clearer example of deliberate fracturing of a minority community.[49]

The issues raised by that action are (1) whether the deliberate elimination of this "coalitional" district is immunized from scrutiny under Section 2 of the Voting Rights Act because African-Americans do not constitute a literal mathematical majority of the district's

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[48] *See Thornburg v. Gingles*, 478 U.S. 30, 80-82 (1986) (finding legally significant white bloc voting even where the fraction of white voters who "cross over" and support minority candidates in general elections was as high as 42%).

[49] At trial, the State emphasized that the new map created a modified version of existing District 25 in the Houston area (renumbered as District 9) in which the African-American population (although not a majority) would have enhanced control of electoral outcomes. But that Houston district has no relevance to a Section 2 challenge to the elimination of a district in Dallas-Fort Worth, especially given the undisputed fact that the set of districts controlled by African-Americans in Plan 1374C (three) falls short of a proportional share (four). *See Johnson v. De Grandy*, 512 U.S. 997, 1014-21 (1994); Jackson Pls. Ex. 1 (Lichtman expert report) at 18, 39-40, 48, *attached as* Exhibit K.

adult citizen population, and (2) whether the same action is constitutional under the Equal Protection Clause because it served a broader partisan agenda. We submit that under the "results" test of Section 2, especially after *Georgia v. Ashcroft*, 123 S. Ct. 2498 (2003), it is one thing to say that States have choices about whether to create "safe" majority-black districts or coalitional districts, but it is quite another to say that they are authorized to choose "neither route." Dissent at 26.[50] Similarly, it is a misinterpretation of the Fourteenth Amendment and Section 2 to hold that the deliberate elimination of a district controlled by African-Americans is immunized from invalidation as intentionally discriminatory because that action was a means to a broader end of establishing an unfair degree of political control for the party in power.

1. The District Court Erred in Holding that the Voting Rights Act Permits the Destruction of a Coalitional District Where African-Americans Consistently Elect the Candidate of Their Choice.

The "50 Percent Rule" under which the District Court rejected Applicants' challenge to the elimination of District 24 as a minority "coalitional" district is a creation of the Fifth Circuit. *See Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852-53 (5th Cir. 1999), *cert.*

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[50] The District Court suggested that there was some doubt about whether current District 24 actually elects African-American candidates of choice, given that incumbent Congressman Frost, an Anglo, has not been challenged in a primary. Majority Op. at 47. But there was unchallenged testimony from local African-American leaders that he is the candidate of choice, s*ee* Dissent at 27, and the African-American candidates of choice consistently carry the district in contested Democratic primaries for other offices. The court also questioned the evidence of African-American cohesiveness in the district. Majority Op. at 47-48. But in two of the three black-white primary contests available to study, African-Americans voted overwhelmingly for African-American candidates opposed by Anglo candidates. The fact that an obscure African-American candidate for the Court of Criminal Appeals, who lost every major demographic group in each of the State's 32 districts, received only 40% of the African-American vote in District 24, *see id.* at 48, hardly suggests that African-Americans there lack cohesiveness – particularly given the State's argument to the Department of Justice that there is clear racial polarization in voting throughout the State. *See* Jackson Pls. Ex. 1 (Lichtman expert report) at 16-17, *attached as* Exhibit K.

denied, 528 U.S. 1114 (2000).[51] The rule provides that Section 2 of the Voting Rights Act imposes no obligation to create or preserve any minority district in which the plaintiff group lacks a mathematical majority of the citizens of voting age. *See id*. But it has no basis in the language of the Act, has proved highly controversial in other courts, and makes little sense.

The rule has been justified as an interpretation of *Thornburg v. Gingles*, 478 U.S. 30 (1986), which established a three-pronged test for plaintiffs seeking the creation of a single-member district in which minorities could elect a candidate of their choice. The first prong requires a showing that the "minority group . . . is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 50. But although the Court's opinion used the term "majority," the Court elsewhere indicated its understanding that assessing an "effective" minority district requires attention not only to minority percentages but also to the voting behavior of non-minorities. *Id.* at 56 ("[A] white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting."); *see also id.* at 46 n.11 ("Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an *ineffective* minority of voters . . . ." (emphasis added)).

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[51] In 1999, the Solicitor General filed briefs in this Court strongly disagreeing with the Fifth Circuit's "flat 50%," or "absolute numerical majority," rule and arguing instead that Voting Rights Act plaintiffs can make out a claim of vote dilution by showing that the minority voters in the plaintiffs' proposed district have the potential to elect a representative of their choice with the assistance of limited but predictable crossover voting from the white majority (or from other racial or language minorities) – regardless of whether members of the plaintiffs' minority group constitute an arithmetic majority in the district. *See, e.g.*, Br. for the United States as Amicus Curiae at 6-14, *Valdespino v. Alamo Heights Ind. Sch. Dist.*, 528 U.S. 1114 (2000) (No. 98-1987). The Justice Department had taken the same position under prior administrations, as well. *See* Br. for the United States at 52-56, *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991).

A few years later, in *Growe v. Emison*, 507 U.S. 25 (1993), the Court explained that satisfying *Gingles*'s first and second prongs together "establish[es] that the minority has the *potential to elect* a representative of its own choice in some single-member district," and satisfying the second and third prongs together "establish[es] that the challenged districting [plan] thwarts a distinctive minority vote by submerging it in a larger white voting population." *Id.* at 40 (emphasis added). "Unless these points are established," the Court further explained, "there neither has been a wrong nor can be a remedy." *Id.* at 40-41. Thus, the focus again was on actual electoral opportunities, not arbitrary mathematical cut points.

The following Term, in *Johnson v. De Grandy*, 512 U.S. 997 (1994), the Court again used language indicating that the essence of *Gingles*'s first prong was a requirement of an "effective" majority of minority voters in the proposed district. It said that the "first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts *with a sufficiently large minority population to elect candidates of its choice.*" *Id.* at 1008 (emphasis added). It then assumed, without deciding, that "even if Hispanics are not an absolute majority of the relevant population in the additional [proposed] districts, the first *Gingles* condition has been satisfied in these cases." *Id.* at 1009. The Court added that while "society's racial and ethnic cleavages sometimes necessitate majority-minority district to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice." *Id.* at 1020; *see also id.* at 1000 (discussing "effective voting majorities"); *id.* at 1004 ("a functional majority of Hispanic voters"); *id.* at 1014, 1021, 1023

n.19 ("an effective voting majority"); *id.* at 1017 ("districts in which minority voters form an effective majority"); *id.* at 1024 ("an effective majority").

Most recently, in *Georgia v. Ashcroft*, 123 S. Ct. 2498 (2003), the Court returned to the theme of "coalitional" districts. Citing *De Grandy*, the Court held that Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, does not require the State to create or maintain majority-minority districts in which minority control is assured, if voting patterns allow instead the creation of coalitional districts in which the relevant voters have the ability to elect candidates of choice in combination with others in the district. 123 S. Ct. at 2511-12; *see also id.* at 2518 (Souter, J., dissenting on other grounds) ("The prudential objective of § 5 is hardly betrayed if a State can show that a new districting plan shifts from supermajority districts, in which minorities can elect their candidates of choice by their own voting power, to coalition districts, in which minorities are in fact shown to have a similar opportunity when joined by predictably supportive nonminority voters.").

Taking these cues, a number of lower courts do not follow the rigid 50 Percent Rule in applying Section 2 of the Voting Rights Act. In *Martinez v. Bush*, 234 F. Supp. 2d 1275 (S.D. Fla. 2002), for example, the three-judge court "doubt[ed that the first *Gingles* factor] was intended as a literal, mathematical requirement." *Id.* at 1320 n.56. Noting that *Voinovich v. Quilter*, 507 U.S. 146 (1993), assumed, without deciding, that less than a literal majority was sufficient for a Section 2 claim, the Florida federal court focused on what it called "performing minority districts," which "may or may not have an actual majority . . . of minority population, voting age population, or registered voters." 234 F. Supp. 2d at 1322. Similarly, in *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991), the three-judge court first noted that the pertinent issue under Section 2 is "not whether [black voters] can elect a black candidate, but rather

whether they can elect a candidate of their choice," and went on to decide that with slightly less than one third of the voting-age population in a particular district, this requirement was satisfied. *Id.* at 1059-60; s*ee also Page v. Bartels*, 144 F. Supp. 2d 346, 363 (D.N.J. 2001) (three-judge court) (noting that minority groups can elect the candidates of their choice in some majority-Anglo districts); *West v. Clinton*, 786 F. Supp. 803, 807 (W.D. Ark. 1992) (three-judge court) (assuming that districts in which minority voters constitute less than an absolute majority of the voting-age population ("VAP") are cognizable under Section 2); *Puerto Rican Legal Def. & Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 681, 694 (E.D.N.Y. 1992) (three-judge court) (stating that there is no bright-line rule for an appropriate VAP level); *Jordan v. Winter*, 604 F. Supp. 807, 814-15 (N.D. Miss.) (three-judge court) (recognizing that Section 2 protects a district with a black population of 41.99%), *summarily aff'd sub nom. Mississippi Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984). State courts, too, have recognized the political reality that minority voters can effectively control some districts even where they are outnumbered by whites. *See, e.g., McNeil v. Legislative Reapportionment Comm'n*, 828 A.2d 840, 853-54 (N.J. 2003) (holding that Section 2 claims are not limited to districts involving literal majorities of minority voters), *petition for cert. filed*, 72 U.S.L.W. 3328 (U.S. Oct. 29, 2003) (No. 03-652).

Most recently, a panel of the First Circuit, in *Metts v. Murphy*, 347 F.3d 346 (1st Cir. 2003), *reh'g granted*, No. 02-2204, 2003 U.S. App. LEXIS 24313 (1st Cir. Dec. 3, 2003), expressly rejected the Fifth Circuit's 50 Percent Rule as "inconsistent [both] with the Supreme Court's descriptions of the functions served by the first *Gingles* precondition [and] with the variety of political realities the [Voting Rights Act] was meant to address." *Id.* at 354.[52]

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[52] Although the First Circuit has granted rehearing *en banc* and therefore has withdrawn the panel's opinion, the court's order granting rehearing calls for briefing on whether the

(Cont'd . . .)

Recognizing what it called "crossover districts," the court concluded that "it is not an absolute bar to a claim under § 2 of the VRA that some amount of crossover voting is needed for a minority group to elect a candidate of its choice." *Id.* at 356. It emphasized that such a bar is particularly inappropriate where a functioning coalitional district already exists and the challenge is to new district lines that would undermine it. *Id.* at 357.

Given the uncertainty in the lower courts, the Court should take this opportunity to determine whether the absence of a mathematical majority in a given area is sufficient to negate all rights under Section 2 to preserve or create an effective "coalitional" district like District 24. It also seems likely that the Court would reverse on this issue. Not only is the 50 Percent Rule out of step with the flexible and pragmatic interpretation the Court has consistently given to the Act, but as this case illustrates, the rule can have the perverse effect of preventing minorities from achieving the statutory goal of an equal opportunity "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). It does so by demanding the unnecessary packing of minority voters into majority-minority districts where that is possible, and by withdrawing all protection from coalitional districts that cannot be converted to majority-minority districts.

Just as importantly, the rule produces unfortunate societal effects by demanding that States maintain majority-minority districts where they are unnecessary to provide minority voting opportunities, as long as there remains some substantial degree of racial polarization in voting. In so doing, they will help to perpetuate polarized voting. As the Court eloquently stated in *Georgia v. Ashcroft*:

(. . . cont'd)
applicability of *Gingles* should be determined after an opportunity for the development of the factual record and, if so, what lines of factual development the plaintiffs would propose.

> The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race. . . . While courts and the Department of Justice should be vigilant in ensuring that States neither reduce the effective exercise of the electoral franchise nor discriminate against minority voters, the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life.

123 S. Ct. at 2517 (citing *Shaw v. Reno*, 509 U.S. at 657).

Both of the adverse effects that this Court warned against are visible in the new Texas congressional map, which creates 22 districts completely dominated by Anglo Republican voters who do not have a history of forming coalitions with minority voters and 10 districts into which the bulk of the State's African-American and Hispanic populations have been packed. So the State is extraordinarily balkanized along both racial and political lines. Moreover, in the process, the map-drawers completely eliminated one of the four districts in which African-Americans were electing candidates of choice, as well as numerous other districts in which African-Americans (and Hispanics) exercised influence by providing the margin of victory.[53] The net result is an unnecessary but intentional denial to African-Americans of any chance of achieving a substantially proportional share of electoral power in the State. As Judge Ward put it: "The treatment of the minority coalitions in old District 24 was inconsistent with the purposes of the Voting Rights Act. The evidence demonstrates that District 24 . . . functioned as a district that fostered our progression to a society that is no longer fixated on race. . . . [T]he black voters in old District 24 repeatedly nominated and helped to elect an Anglo congressman with an impeccable record of responsiveness to the minority community." Dissent at 27. There is every reason to conclude that Section 2 of the Voting Rights Act protects their right to do so.

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[53] Jackson Pls. Ex. 1 (Lichtman expert report) at 18-39, 70-73, *attached as* Exhibit K.

2. The Deliberate Elimination of a Functioning Coalitional District Can Violate the Equal Protection Clause Even If Shown to Be Part of a Larger Effort to Achieve Partisan Advantage.

While minority vote-dilution claims under Section 2 are based purely on a "results" test and therefore require absolutely no showing of discriminatory intent or purpose, *see Gingles*, 478 U.S. at 35, minority vote-dilution claims under the Equal Protection Clause do require proof that the racial or ethnic discrimination was *intentional*. *See Rogers v. Lodge*, 458 U.S. 613, 617-18 (1982); *City of Mobile v. Bolden*, 446 U.S. 55, 61-62, 65-66 (1980) (plurality opinion). The District Court in this instance refused to find that the deliberate eradication of District 24 as a coalitional district was intentional racial discrimination – despite the undisputed evidence that the legislature had been warned by its own expert that the district functioned in this way – because the action was part of a larger political agenda. The court thus assumed that a primary political motive negates a secondary racial one. That was reversible error.

The general rule in analyses of racial intent in the legislative context under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977), is that it is sufficient if discriminatory intent was *one* of the causative factors. "Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated *solely* by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." *Id.*; *see also Hunter v. Underwood*, 471 U.S. 222, 231-32 (1985) (State's additional purpose of discriminating against poor whites does not "render nugatory the purpose to discriminate against all blacks").

That is the rule that prevails in cases challenging district maps as intentionally dilutive of minority voting power. *Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990) (although line drawers acted primarily to protect incumbents, their knowledge that they were

preventing the emergence of a Hispanic district together with other aspects of the process leading to the decision were sufficient to require a finding of secondary racial intent, which in turn relieved plaintiffs of the burden of proving that Hispanics could form a mathematical majority in a proposed district); *McMillan v. Escambia County*, 688 F.2d 960, 969 n.19 (5th Cir. 1982) (An "incumbent legislator's desire to remain in office [cannot] justify or legitimate an election scheme that is purposefully discriminatory."); *Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984) ("Since it is frequently impossible to preserve white incumbencies amid a high black-percentage population without gerrymandering to limit black representation, . . . many devices employed to preserve incumbencies are necessarily racially discriminatory. We think there is little point for present purposes in distinguishing discrimination based on an ultimate objective of keeping certain incumbent whites in office from discrimination borne of pure racial animus.").

The District Court's contrary conclusion was based, first, on its assumption that the intent analysis used in the *Shaw v. Reno* line of cases can be applied without modification to a case where line-drawers deliberately disenfranchised a group of minority voters to achieve some broader political objective. Majority Op. at 24. But while the Court has seen fit to cabin the racial-gerrymandering doctrine by requiring a finding of "predominant" racial intent, that test does not make sense where line-drawers intentionally dismantle a functioning minority coalitional district to prevent the election of the African-American candidate of choice, then turn around and say that the reason is that those African-American voters keep choosing a Democrat. In such a case, as prior dilution cases say, the infliction of the dilution injury justifies recognition of at least a secondary racial intent.

For much the same reason, the District Court erred in relying on *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), which held that there was no basis for a finding of intent to

discriminate against women based on the enactment of a hiring preference favoring veterans. Here, the injury was deliberately inflicted on a district providing minority voting opportunities. A political justification for that action cannot justify treatment of the injury as a mere "disparate impact," any more than an employer can bar hiring blacks and defend the decision as one designed to please customers and increase profits. In both cases the act is intentionally discriminatory, even though there may be some other long-term end being served.

As the Ninth Circuit explained in *Garza*, the defendants "intended to create the very discriminatory result that occurred. That intent was coupled with the intent to preserve incumbencies, but the discrimination need not be the sole goal in order to be unlawful." 918 F.2d at 771. Judge Kozinski dismissed the argument that there can be no "intentional discrimination" without an invidious motive:

> Indeed there can. A simple example may help illustrate the point. Assume you are an anglo homeowner who lives in an all-white neighborhood. Suppose, also, that you harbor no ill feelings toward minorities. Suppose further, however, that some of your neighbors persuade you that having an integrated neighborhood would lower property values and that you stand to lose a lot of money on your home. On the basis of that belief, you join a pact not to sell your house to minorities. Have you engaged in intentional racial and ethnic discrimination? Of course you have. Your personal feelings toward minorities don't matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood.

Id. at 778 n.1 (Kozinski, J., concurring in relevant part).

Next, Judge Kozinski noted that the Los Angeles County supervisors who adopted the map harbored no "ethnic or racial animus toward the Los Angeles Hispanic community." *Id.* at 778. The intentional discrimination was not "based on any dislike, mistrust, hatred, or bigotry against Hispanics or any other minority group." *Id.* Indeed, the district court had found that the defendants might well have drawn the map to increase Hispanic voting strength, had that goal been compatible with their political aim of preserving their own incumbencies.

What mattered, Judge Kozinski explained, was "that elected officials [who were] engaged in the single-minded pursuit" of political advantage had "run roughshod over the rights of protected minorities." *Id.* Where "the record shows that ethnic or racial communities were split to assure a safe seat for an incumbent, there is a strong inference – indeed a presumption – that this was a result of intentional discrimination, even absent . . . smoking gun evidence." *Id.* at 779. If that standard had been applied here, there can be no doubt that the Defendants would have been found to have acted unconstitutionally. But the District Court, in its lengthy opinion, did not see fit even to mention *Garza*, let alone distinguish it.

C. The State's Effort to Protect a Weak Incumbent Diluted Hispanic Voting Strength in His District and Led Directly to Racial Gerrymandering in Neighboring South Texas Districts.

A second region where the State's new district lines contravene federal law is South Texas where, as the Defendants acknowledged and the court below found, District 23 was modified to protect incumbent Congressman Henry Bonilla – the only Mexican-American Republican in the House of Representatives – by making the district solidly Republican while preserving the *appearance* of a majority-Hispanic district. Majority Op. at 68; Dissent at 6-7. That action had two major effects. *First*, it left 359,000 Hispanics stranded in a district where they have virtually no hope of influencing, much less controlling, electoral outcomes, in violation of Section 2 of the Voting Rights Act and the Equal Protection Clause. *Second*, in a vain attempt to ameliorate that illegality, the State then created a new Hispanic district, by squeezing new District 25 (which runs from McAllen on the Mexican border to the heavily Hispanic neighborhoods of Austin 300 miles away) in between two preexisting Hispanic districts in South Texas. Thus, Defendants violated not only the Voting Rights Act but also – more

glaringly – the racial-gerrymandering doctrine established by this Court in *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny.

1. District 23 Violates Hispanic Citizens' Voting Rights.

The majority below erroneously found that District 23 under the court-drawn Plan 1151C was not an effective district for Hispanic voters. Majority Op. at 65. Under that plan, District 23 – which runs along the Rio Grande from the outskirts of El Paso to the city of Laredo in Webb County and then ranges north to San Antonio – was a district where Hispanics constituted not only a majority of the citizen voting-age population but also a robust 55% majority of the registered voters. Although the incumbent Congressman Henry Bonilla has never been the candidate of choice of Hispanic voters, he has managed to win re-election on the strength of overwhelming Anglo support. But two trends were threatening his incumbency. First, Hispanic opposition to Congressman Bonilla was increasing, to the point where, in November 2002, fully 92% of the district's Hispanic voters backed his Democratic opponent. Majority Op. at 67; Dissent at 6-7. Second, the Hispanic fraction of the district's electorate was also rising rapidly. Dissent at 6-7. In combination, these trends had held the incumbent to just 51.5% of the total vote in November 2002, even though his campaign spent well over $2 million. At the same time, almost all of the Democratic candidates for statewide office were carrying District 23, while losing elsewhere in the State. Uncontradicted expert testimony, confirmed by one of the State's chief mapmakers, State Representative Phil King, showed that the growth in Hispanic population and political cohesiveness would likely overtake Congressman Bonilla in either the 2004 or 2006

elections.[54] Even the State's own expert, Professor Gaddie, testified that the district "performed" for Hispanic voters, whose preferred candidates had carried the district in 13 of the last 15 statewide elections.[55] Dissent at 3, 6. Clearly, as drawn by the court in 2001, District 23 provided Hispanic voters with a realistic opportunity – though not a lock cinch – to elect their preferred candidate to Congress, even if they were unable to realize that opportunity in the 2002 elections.

The 2003 redistricting, however, changed all of that. The State carved up the Hispanic neighborhoods in Laredo and Webb County, both 94% Hispanic, and shipped half of them out of Congressman Bonilla's district. Majority Op. at 67. The State replaced them with Anglo population from the San Antonio suburbs and the heavily Anglo, Republican "Hill Country" counties of Bandera, Kerr, and Kendall. As a result of this swap, the fraction of the district's registered voters with Spanish surnames dropped from 55% to 44%. *Id.* And the citizen voting-age population dropped from 57% Hispanic to just 46%. *Id.* Moreover, the district's partisan composition shifted from marginally Democratic to solidly Republican. The net effect of the population swap was to transform District 23 into one firmly controlled by Anglo Republicans. Moreover, the new District 23 still contains more than 359,000 Hispanics, who are now stranded in a district where they will have no effect on the outcome of congressional elections marked by extreme (and undisputed) racial polarization. As even the court below conceded, District 23 under the State's map is "unquestionably" a district where Hispanics lack any realistic opportunity to elect their preferred candidate. Majority Op. at 67.

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[54] Jackson Pls. Ex. 1 (Lichtman expert report) at 56-57, *attached as* Exhibit K; Tr., Dec. 16, 2003, 8:30 a.m., at 111-12 (Prof. J. Morgan Kousser); Tr., Dec. 16, 2003, 8:30 a.m., at 76-77 (Prof. Henry Flores).

[55] Jackson Pls. Ex. 140 (Gaddie expert deposition) at 128-29.

Furthermore, the State admitted that it was intentionally protecting Congressman Bonilla from Hispanic challengers popular with Hispanic voters in Laredo and Webb County. Representative King, the chief architect of the map in the House, bluntly testified:

> [O]ne of our early objectives was to try to help Henry Bonilla, try to give him more Republicans. . . . [W]e did that by moving up toward Kendall and up into the Hill Country a little bit. Well, if you do that, you've got to take votes out of – out of somewhere else. We did that by – ultimately by splitting Webb County.
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> There were other considerations for that too, though, because if we hadn't split Webb County, Henry Cuellar and Richard Raymond [two potential Hispanic Democratic challengers] would have been running, and we didn't want to, you know, if we could help Henry Bonilla avoid a Democratic opponent, we wanted to do that as well.[56]

In his dissent, Judge Ward took the majority to task for its decision to uphold the intentional dismantling of District 23: "[T]he State altered the racial composition of District 23 . . . to ensure [that its Hispanic community] would have no practical influence on the congressional election. All of the experts agree that Plan 1374C alters District 23 to the point where it has no hope of functioning as an effective Latino opportunity district." Dissent at 6. Judge Ward further noted that with the Hispanic population growth in District 23, "Congressman Bonilla would ultimately lose." *Id*. Judge Ward accurately described what the State did in this way:

> The State's solution to this political problem was brutal, yet simple: destroy the opportunity district. The state did so by cracking a cohesive Hispanic community out of Webb County and taking in Anglos from the Texas Hill Country to build a district in which the Hispanic community will not be able to influence the outcome of election. . . . Contrary to the majority's characterization, the district's very design ensures a lack of competitiveness and a corresponding lack of responsiveness.
>
> There are, however, a total of 359,000 Latinos who continue to reside in new District 23. They object to the State's dismantling of their opportunity district under § 2. The question presented is whether a state can, consistent with §

[56] Tr., Dec. 18, 2003, 1:00 p.m., at 146-47 (Rep. Phil King).

> 2, intentionally dilute a minority group's voting rights in an existing opportunity district to obtain a partisan advantage while, at the same time, offset[ing] the effects by creating a new district in another part of the state. The majority's answer is that *Ashcroft* and *Johnson v. De Grandy*, 512 U.S. 997 (1994), permit this sort of line-drawing. I disagree.

Id. at 7.

2. District 25 Violates the *Shaw* Doctrine.

Defendants recognized that the transformation of District 23 to save Congressman Bonilla posed serious Voting Rights Act problems, so they intentionally set out to create a "replacement" Hispanic district in the southern part of the State. The squeezing of an additional Hispanic district into South Texas forced the State to reach further north into the Hill Country, all the way to the state capitol of Austin, 300 miles from the border. As a result, the State drew three districts that the court below derided as "bacon strip" districts. Majority Op. at 77.[57] Color maps depicting one of the "bacon strip" districts, District 25, are attached as Exhibits N and O. *See also* Exhibit G (statewide color map).

As drawn by the State, District 25 unites two concentrations of Hispanic population – in the northern part of the district (in the city of Austin) and along the Mexican border (in and around the city of McAllen). Majority Op. at 77. More than 89% of the district's Hispanics reside at either end of the district (in Travis County at the northern tip and in Hidalgo and Starr Counties at the southern tip), with sparsely populated counties in between serving as little more

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[57] Judge Ward did not concur in the part of the decision holding that the "bacon strip" districts were not racial gerrymanders. In his view, the State violated Section 2 of the Voting Rights Act when it intentionally dismantled District 23, and the restructuring of the districts in South and Central Texas that would be necessary to remedy that violation "render[ed] it unnecessary to assess whether the 'bacon strip' districts violate the principles set forth in *Shaw v. Reno* and its progeny." Dissent at 23.

than a "land bridge." Majority Op. at 77, 85.[58] The court below found that these two far-flung population centers, although both heavily Hispanic, lack any commonality of needs and interests. *Id.* at 77. The majority noted that each of the "bacon strip" districts (Districts 15, 25, and 28) included "disparate communities of interest" with "differences in socio-economic status, education, employment, health, and other characteristics between Hispanics who live near Texas's southern border and those who reside in Central Texas." *Id.* at 93. That finding was reminiscent of *Miller v. Johnson*, 515 U.S. 900 (1995), in which this Court found Georgia's Eleventh Congressional District to be an unconstitutional racial gerrymander because it united two large concentrations of black population in Atlanta and coastal Chatham County that were "260 miles apart in distance and worlds apart in culture." *Id.* at 908. The "social, political, and economic makeup of the Eleventh District," like that of Texas's new District 25, told "a tale of disparity, not community." *Id*. *Compare id.* at 928 Appendix B (color map showing population densities within Georgia's District 11) *with* Exhibit O (identically formatted map for Texas's new District 25).

Furthermore, Texas's new District 25 is not functionally compact, as it covers parts of four media markets and demands what is (for a district most of whose constituents are urban) an absurd amount of long-distance driving for any Representative or congressional candidate. The State's expert Todd Giberson admitted that, to travel from Austin (the district's northern tip) to McAllen (its southern tip), one would begin in District 25 and drive to District 21, then to District 28, then back to District 21, and then back to District 28, then back through District 25

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[58] Jackson Pls. Ex. 82 at 7.

for 20 miles or so, then on to District 15, and finally ending up in District 25 again – having spent less than 10% of the 300-plus-mile journey within the confines of District 25.[59]

The trial court, based largely on its analysis of the district compactness scores computed by the Texas Legislative Council (TLC), concluded that District 25 and the other "bacon strip" districts were not racial gerrymanders. In doing so, the majority found that the compactness scores of the bacon-strip districts did not "approach those of [the] districts [that were] so bizarrely and irregularly drawn" in the 1990s that they triggered strict scrutiny as presumptively unconstitutional racial gerrymanders. Majority Op. at 84.

That finding was plainly wrong and was contradicted by the State's own expert, Mr. Giberson.[60] He testified that the TLC routinely calculates, for every proposed district, a "Smallest Circle" score, which is simply the ratio of the area of the smallest circle that could circumscribe the district to the area of the district itself. This score measures how elongated, or stretched out, a district is. A district that is roughly circular, or square, would score very well, and a district shaped like a toothpick, a snake, a barbell, or a bacon strip would score poorly. *See* Exhibit N (silhouette of District 25). Using this measure, Mr. Giberson conceded that District 25 scored worse than half a dozen congressional districts that were determined to be racial gerrymanders subject to strict scrutiny in the 1990s. Among the 1990s racial gerrymanders whose scores were not as bad as Texas's new District 25 were:

- Georgia's District 11, struck down in *Miller v. Johnson,* 515 U.S. 900 (1995).
- Georgia's District 2, struck down in *Johnson v. Abrams*, 922 F. Supp. 1556 (S.D. Ga. 1995) (three-judge court), *aff'd*, 521 U.S. 74 (1997).

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59 Tr., Dec. 19, 2003, 8:00 a.m., at 47 (Todd Giberson).

60 *Id.* at 40 (Todd Giberson).

- New York's District 12, struck down in *Diaz v. Silver*, 978 F. Supp. 96 (E.D.N.Y.) (three-judge court), *summarily aff'd*, 522 U.S. 801 (1997).
- Virginia's District 3, struck down in *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va.) (three-judge court), *summarily aff'd*, 521 U.S. 1113 (1997).
- Illinois's District 4, which was held to be a presumptively unconstitutional racial gerrymander, but was ultimately upheld as narrowly tailored to serve a compelling state interest, in *King v. Illinois Board of Elections*, 979 F. Supp. 619 (N.D. Ill. 1997) (three-judge court), *summarily aff'd*, 522 U.S. 1087 (1998) (with Scalia, Kennedy & Thomas, JJ., dissenting).
- South Carolina's District 6, which the parties stipulated was a racial gerrymander in *Leonard v. Beasley*, Civil No. 3:96-CV-3640 (D.S.C. 1997) (three-judge court) (stipulating that traditional redistricting principles had been subordinated to racial considerations in the drawing of the district, but agreeing to dismiss the claim in anticipation of the 2000 census).

The court below plainly erred when it found that the Smallest Circle compactness score for District 25 was better than the scores for districts previously struck down as unconstitutional racial gerrymanders.

But the trial court's erroneous conclusion that race was not the predominant purpose behind the configuration of the bacon-strip districts, including District 25, was not based simply on its mistaken view of the relative compactness scores. The court actually ignored direct testimony from the State's own expert (Mr. Giberson) and one of the chief architects of the plan (State Representative King) that the intent in creating new District 25 was racial, not political.

> Q. Now District 25 was drawn intentionally to create an eighth majority Hispanic district in the State, wasn't it?

A. I believe that's the testimony, that they were trying to draw a Hispanic district.

Q. And you'd agree that race predominated over partisan politics in constructing District 25, wouldn't you?

A. I would say – I would say so. It was more important to create a Hispanic district than a Democratic district, for example.[61]

Moreover, the court further erred in concluding that the claim of excessive consideration of race was negated by the fact that the creation of the noncompact District 25 was an indirect result of the "political goal of increasing Republican strength in congressional District 23" and maintaining Republican strength in nearby District 21. Majority Op. at 91-92. But in *Bush v. Vera*, 517 U.S. at 967-70 (O'Connor, J., principal opinion), this Court expressly rejected the argument that race-based line-drawing could be excused when it results from a desire to protect a nearby incumbent. There, the irregular shape of a challenged African-American district had been defended as necessary not to capture African-American voters *per se*, but to do so consistent with the interests of adjacent incumbents. The Court rejected such a justification for racial gerrymandering, in a decision utterly inconsistent with the reasoning of the majority below. *Id.*

II. The Balance of Equities and the Public Interest Strongly Favor Using the One Map Known to Comply Fully with All Federal Constitutional and Statutory Requirements.

The balance of the equities strongly favors maintaining the status quo, which is Plan 1151C – the map that (1) was used in the 2002 elections, (2) has been adjudicated (by the District Court and by this Court) to be fully lawful, and (3) was found by experts for both sides

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[61] *Id.* at 47 (Todd Giberson). Likewise, Representative King admitted that the creation of District 25 was intended to add an additional Hispanic district between the border and Travis County. Tr., Dec. 18, 2003, 1:00 p.m., at 152.

to be a model of partisan fairness.[62] If the Court notes probable jurisdiction and reverses the judgment below, there will be irreparable harm caused by the loss of constitutional and statutory rights and by the defeat of long-standing incumbents as a result of a mistaken decision to allow an illegal map to take effect. By contrast, if Plan 1151C is used while matters proceed in this Court, *no legal right will be denied to anyone* and the only "harm" – in the event the Court affirms – will be a two-year delay in allowing Defendants to implement their openly acknowledged partisan gerrymander. That concern does not justify running the risk of allowing an illegal map to go into effect pending appeal, where there is an available alternative that is fully lawful and that Defendants and all election administrators in the State are ready to use if the Court so directs.

There can be little doubt that Applicants – and many other Texas voters – will be irreparably harmed if elections are allowed to proceed under Plan 1374C and the Supreme Court subsequently finds that plan to be in violation of the Constitution or the Voting Rights Act. First, holding elections under an unconstitutional map by its very nature inflicts irreparable harm – because even a temporary deprivation of constitutional rights is an irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of [constitutional] freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). For that reason alone, the Court should be wary of allowing a redistricting plan to take effect prior to a conclusive determination whether it goes too far in deliberately undermining the ability of Democratic and minority voters to elect candidates of their choice.

Moreover, even if the new plan is invalidated after the 2004 elections are held under it, the harms it causes will be far from over. The avowed purpose of the map is to assure that half a

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[62] *See supra* note 41.

dozen or more incumbent Members of Congress are thrown out of office. Once that occurs, the subsequent implementation of some new and legal map for 2006 and beyond will hardly constitute a full remedy. To the contrary, Texas will have a large class of freshmen Representatives initially elected due to the invalid plan's bias favoring Anglo Republicans, and those freshmen will leverage their incumbent status to gain a huge head start in 2006, regardless of whatever legal map is put in place in the wake of this Court's ruling. Even if the exact same map used in 2002 were put back into effect in 2006, the disruption in 2004 of the relationships between the Democratic Representatives and their core constituents could very well assure that those districts would continue to be represented by the new Republican incumbents who owe their seats in Congress to an illegal map and who will win despite the nearly unanimous opposition of minority voters in those districts.

In sum, regardless of any subsequent events in this litigation, Plan 1374C's designers will have won a significant victory merely by virtue of being allowed to use the map in a single election. That should not occur given the very real prospect that the new map will ultimately be struck down on the merits.

Arrayed on the other side of the equity calculus – if the Court were to grant a stay but ultimately affirm the judgment below – is the harm from a State being unnecessarily prevented from using a legislatively enacted redistricting plan for one election cycle. But that harm, by itself, cannot outweigh the irreparable harms to Applicants and other Texas citizens. *First*, delaying the implementation of the new plan would not prevent its being used three times – in 2006, 2008, and 2010. So the legislative policies reflected in the plan – assuming they are legal, contrary to our contentions – would have plenty of time to be implemented. *Second*, the State of Texas did not find this harm to be very significant two years ago when it refused to adopt a new

congressional map and forced the federal court to do that job for it. *Third*, the need for interim relief here arises only because the Legislature passed its new map on the eve of the 2004 election cycle, forcing the District Court to hold a trial on an emergency basis and preventing this Court from having the time to adjudicate the merits of the appeal before the March 2004 primary elections. *Fourth*, even if the Court ultimately determines that the severe degree of partisan bias in the new plan is constitutionally permissible, Defendants' claims of harm from being delayed in implementing the new map certainly merit less weight given the acknowledged fact that partisan gain was the central animating principle that drove the line-drawing process. For all of these reasons, the equitable arguments for allowing the new map to be used while its legality is still being finally determined on appeal are weak. *See Lucas v. Townsend*, 486 U.S. at 1305 (granting a stay pending appeal in a Voting Rights Act case because any burden on the defendants could "fairly be ascribed to [their] own failure to [act] sufficiently in advance of the date chosen for the election" and because "the burdens of inertia and litigation delay [should not fall] on those whom the statute was intended to protect").

A final consideration is the public interest. Here, it is important to take into account the effects of continual changes in congressional districts. The voters of Texas have already elected Members of Congress under two different districting plans in the previous two elections – 2000 and 2002. If Plan 1374C is allowed to go into immediate effect, they will have to cast their ballots in a third set of districts that are dramatically different. If this Court then strikes down that new plan, a fourth plan might well follow for 2006. This kind of continual reshuffling of the deck causes great confusion among voters and election administrators alike and interferes with voters' efforts to establish or maintain relationships with, and to attempt to influence, their Representatives in Congress.

By contrast, using the 2002 map again in 2004 would promote a measure of stability. Moreover, that map has already been held to be fully lawful and the experts on both sides found it to be politically fair. Election administrators have been directed to stand ready to use Plan 1151C if the courts so order. Indeed, candidate qualifying under Plan 1151C was completed just a week ago. The public interest would clearly be served by using this map a second time, given that the new map's legality is subject to serious question.

CONCLUSION

For the reasons set forth above, Applicants urge this Court to stay the District Court's January 6, 2004 judgment pending final disposition of this appeal. That stay would have the effect of reinstating the District Court's November 14, 2001 injunction and thus requiring Defendants to conduct the 2004 primary, runoff, and general elections for Texas's Representatives in Congress under Plan 1151C.

Respectfully submitted,

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